2000

Dejavue, Inc., Kristine C. Shultz and Allison Nord v. U.S. Energy Corp. : Reply Brief

Utah Supreme Court

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BRIEF

DOCKET NO. 20000110

IN THE SUPREME COURT OF THE STATE OF UTAH

DEJAVUE, INC., a Utah corporation, KRISTINE C. SCHULTZ and ALLISON NORD,	:	Supreme Court No. 20000110
Plaintiffs-Respondents,	:	Court of Appeals No. 981772-CA
vs.	:	Priority No. 15
U.S. ENERGY CORP., a Wyoming corporation,	:	
Defendant-Petitioner.	:	

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTORY STATEMENT

The Petition for Writ of Certiorari filed by defendant, U.S. Energy Corp., demonstrates that the court of appeals decision conflicts with prior decisions of this Court in approving an award of punitive damages *without any finding of tort liability*, without a prior finding of punitive damage liability, and despite unlawful introduction of wealth evidence. (Pet. 6-13.) The court of appeals decision also departs from prior cases of this Court by awarding attorney fees for *all of plaintiffs' claims*, without any reduction or apportionment for unsuccessful claims or claims unrelated to U.S. Energy's counterclaim, which was found to be the sole basis for the fee award. (Pet. 13-16.)

Plaintiffs' opposition brief fails to address the specific points established in the petition, focusing instead on marshaling of evidence and waiver arguments that are unrelated to the issues presented. The purpose of this Reply Brief is to focus the Court back on the issues presented, and to demonstrate more specifically how the court of appeals decision on punitive damages and attorney fees conflicts with prior decisions of this Court.

ARGUMENT

POINT I: THE COURT OF APPEALS DECISION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT REGARDING ESSENTIAL CONDITIONS FOR AWARD OF PUNITIVE DAMAGES.

Plaintiffs attempt to divert attention from the issues actually raised by U.S. Energy in its petition to this Court. (Opp. Br. 7-9.) *U.S. Energy does not here challenge any jury instruction or the sufficiency of evidence to support the verdict.* Rather, the issues raised on this petition are *purely legal*: 1) Can punitive damages be awarded in the

absence of any tort liability? 2) Can punitive damages be awarded without any prior *finding* of punitive damage liability; i.e., a finding, *regardless of sufficiency of evidence*, that U.S. Energy engaged in willful and malicious conduct? 3) Can punitive damages be awarded when illegal wealth evidence was introduced, even without objection, during the compensatory damage phase of the trial? On those legal issues, marshaling of evidence is irrelevant.[1]

As more fully set forth in the petition, those issues were decided contrary to this Court's prior decisions, or present matters of first impression. The court of appeals sidestepped the first issue, affirming the verdict of punitive damages while *conceding* that it was "unable to determine," and had "no way of knowing," whether the verdict was based on tort or contract. 383 U.A.R. at 11, ¶ 19, and 12, ¶ 25. That ruling squarely conflicts with this Court's decision in *Cook Associates, Inc. v. Warnick*, 664 P.2d 1161, 1167 (Utah 1983), holding that a "verdict for punitive damages cannot be sustained [when] the record does not show an award of compensatory damages *in tort* to which such punitive damages could be ascribed." (Emp. added.) Plaintiffs make *no effort* to distinguish the *Warnick* case or its undisputed statement of the law.

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[1] Plaintiffs attempt to avoid the real issues by arguing that "the bulk" of the court of appeals opinion dealt with the marshaling requirement and waiver. (Opp. Br. 6.) However, that is not accurate. In a minor, secondary argument to the court of appeals, U.S. Energy asserted the *absence of any evidence* to support an award of punitive damages. That argument rendered marshaling of evidence unnecessary because nonexistent evidence cannot be "marshaled." The court of appeals' ruling on that argument is *immaterial because U.S. Energy has abandoned that argument for purposes of its petition to this Court.* The marshaling argument pertains *only to sufficiency of evidence; marshaling of evidence has nothing to do with the issues raised here*, such as the absence of any tort basis for punitive damages at all.

On the second issue, plaintiffs simply parrot the court of appeals ruling that punitive damages can be awarded *without a prior finding of punitive damage liability* when the defendant does not "object to the procedure." (Opp. Br. 8-9.) *See* 383 U.A.R. at 10, ¶ 15. However, we are talking about more than mere procedure. U.C.A. § 78-18-1 *absolutely prohibits* an award of punitive damages without a prior finding of punitive conduct, established by clear and convincing evidence. This Court has never addressed the issue of whether that statutory mandate can be waived, presenting here an issue of first impression. This Court has authority to review a manifest violation of statute, even though not raised in the trial court. (Pet. 11.) Moreover, the court of appeals' characterization of the issue as one of mere procedure contradicts this Court's holding in *Cook Associates, Inc. v. Warnick, supra*, which places "the burden of requesting special verdicts" squarely on the *plaintiff*. 664 P.2d at 1168. It is the plaintiffs, here, who had the obligation to establish punitive liability in the *first verdict form*. That waiver, *by plaintiffs*, cannot be excused by a perceived waiver in the *second verdict form* when the jury should never have received a second verdict form.[2]

The third issue is one of first impression: Can the statutory mandate of section 78-18-1(2), absolutely prohibiting wealth evidence during the compensatory damage phase of trial, be waived by inadvertent failure to object? Case law in analogous

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[2] The court of appeals decision also conflicts with *Crookston v. Fire Insurance Exchange*, 817 P.2d 789, 807 (Utah 1991), and other cases that expressly require bifurcated consideration of punitive damages and, thereby, implicitly preclude consideration of punitive damages without a *prior finding* of punitive liability. The court of appeals merely "assumed" a finding of punitive liability from the verdict of punitive damages. 383 U.A.R. at 10, ¶ 16. However, such a procedure simply "skips" the essential finding of liability, contrary to the law established by this Court.

contexts indicates that it cannot be waived. This Court can review the issue pursuant to Rule 103(d), permitting review of "plain error."

POINT II: THE COURT OF APPEALS DECISION AWARDING UNRESTRICTED ATTORNEY FEES IS CONTRARY TO THIS COURT'S PRIOR DECISIONS.

Assuming, for purposes of this argument, that plaintiffs are entitled to *some* attorney fees under the lease agreement, the court of appeals decision awarding plaintiffs *all their fees for all work on all claims and defenses* is plainly contrary to this Court's prior decisions. As set forth in the petition, in a case involving multiple contract and tort claims and counterclaims, the party requesting fees *must allocate fees among the various claims* and between successful and unsuccessful claims. (Pet. 13-14.) Plaintiffs *made no allocation.* The court of appeals nonetheless awarded all fees on the basis that plaintiffs prevailed on defendant's contract counterclaim alone. 383 U.A.R. at 11, ¶ 20.

This decision is plainly contrary to this Court's prior decisions in *Cottonwood Mall Co. v. Sine*, 830 P.2d 266, 269 (Utah 1992); *Foote v. Clark*, 962 P.2d 52, 55 (Utah 1998); and *Valcarce v. Fitzgerald*, 961 P.2d 305, 318 (Utah 1998), which all require a claimant to apportion requested fees among contract and noncontract claims, and successful and unsuccessful claims. Absent such an apportionment, the trial court, or a reviewing court, has no way of knowing whether the fee amount requested is reasonable. *See Foote, supra*, at 55 ("Even a cursory look at counsel's affidavit reveals counsel's failure to properly categorize the fee request and raises questions about the reasonableness of the fees . . . ."); *Valcarce, supra*, at 318 ("trial court . . . may not award

wholesale all attorney fees requested if they have not been allocated as to separate claims").

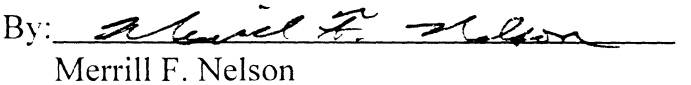
Here, plaintiffs' award should have been limited to the fees actually related to prevailing on defendant's counterclaim. For example, plaintiffs' tort claims for fraud and infliction of emotional distress are unrelated to defendant's counterclaim for an accounting of receipts and expenditures. Plaintiffs should not be awarded unlimited attorney fees for a multitude of contract and tort claims and defenses when the actual basis for the verdict cannot be determined, and the only basis for fees is the contract counterclaim.

CONCLUSION

Based on the foregoing, this Court should grant the petition for writ of certiorari.

Respectfully submitted this 16th day of March, 2000.

KIRTON & McCONKIE

By: 

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CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing **Reply Brief in Support of Petition for Writ of Certiorari** to be mailed through United States mail, postage prepaid, this 16th day of March, 2000, to the following:

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